IS COPYRIGHT A HUMAN RIGHT?

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INTRODUCTION

The title of this Article may come as a surprise. The question whether or not copyright is a human right is not an obvious one. Most copyright lawyers are not unduly preoccupied by it. Instead, they see human rights as a set of rights that might interfere with copyright. Traditionally they argue that copyright accounts for freedom of speech and access to information in its own rules, but there is a growing acceptance that there may nevertheless still be a conflict. Copyright and human rights certainly interact, but it is important to know how that interaction takes place. If copyright is a human right it is much more an interaction between equals, but if it is not, then human rights should take priority as the higher norm. The question of whether copyright is a human right is therefore not without relevance.

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That interaction between copyright and intellectual property rights and human rights is not a new phenomenon. This Article demonstrates that while in the United Kingdom this interaction gave the impression of being something new, its roots go back a long time and are of a fundamental nature. No doubt its perceived newness is a consequence of the introduction of a formal Bill of Rights in the form of the Human Rights Act 1998, which provided a sharp focus on human rights in the English legal system.[1] Also in a broader international context, copyright and intellectual property rights and human rights seemed to develop in virtual isolation of each other for quite a while.[2] The vast majority of copyright and intellectual property rights standard texts illustrate this point. No reference to human rights is found[3] and similarly most standard human rights law texts do not refer to copyright and intellectual property rights. In other words, the interaction between the two areas of law may well not be a new phenomenon, but the study of it has only attracted attention in recent years.[4]

Two approaches to this interaction deserve discussion.[5] The first approach is based on the conflict model and views copyright and intellectual property rights as in fundamental conflict with human rights.[6] The proponents of this approach argue that strong intellectual property rights are bound to undermine human rights, in particular their economic, social, and cultural aspects.[7] The conflict model suggests that this incompatibility should be resolved through recognizing the primacy of human rights whenever a conflict arises because in normative terms human rights are fundamental and of higher importance than intellectual property rights.[8] This

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1. Human Rights Act, 1998, c. 42 (Eng.); *see* JOHN WADHAM ET AL., BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998 (4th ed. 2007).

2. Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 49-50 (2003).

3. P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343, 350 (Rochelle Cooper Dreyfuss et al. eds., 2001).

4. For an example, see the expansion of the treatment in the second edition of J.A.L. STERLING, WORLD COPYRIGHT LAW (2d ed. 2003), when compared to its predecessor, J.A.L. STERLING, WORLD COPYRIGHT LAW (1st ed. 1998). *See also* Hugenholtz, *supra* note 3, at 351 (referring to URHEBERRECHT: KOMMENTAR § 97, Nos. 19-25, at 1500-04 (Gerhard Schricker ed., 2d ed. 1999)); Michel Vivant, *Authors' Rights, Human Rights?*, 174 R.I.D.A. 60 (1997).

5. *See* Helfer, *supra* note 2, at 47-48.

6. *See, e.g.*, U.N. High Comm'r for Human Rights, U.N. Sub-Comm'n on the Protection of Human Rights, 52d Sess., *Intellectual Property Rights and Human Rights, Res. 2000/07*, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000).

7. *Id.*

8. *See, e.g.*, *id.* pmbl., ¶ 11; ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000), *available at* http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html (last visited Sept. 27, 2007).

approach primarily focuses on the practical effects of certain forms of intellectual property rights in specific situations; it does not address the broader picture, involving the function and nature of the elements involved in the interaction.

The second approach embraces a broader perspective, which posits that both intellectual property rights and human rights are on the same fundamental equilibrium. On one hand, there is a need to define the scope of the private exclusive right that is given to authors to effectively encourage and recognize creative contributions to society. On the other hand, there is the broader interest of adequate public access to the fruits of authors' efforts. Both intellectual property law and human rights law try to strike a balance between public and private rights and, in this sense, the two are not in conflict. Both areas of law, however, do not define that balance in exactly the same way in all cases. Therefore, there is compatibility between them, rather than a consensus.[9]

There are many aspects to the interaction between intellectual property rights and human rights, but this Article focuses on just one. It examines whether or not it might be too restrictive to see intellectual property rights and human rights solely as two sets of distinct rights in which their interaction can be examined through the models set out in the previous paragraph. It contemplates whether copyright can indeed be considered as a human right, both at international and national levels. Additionally there is a need to examine whether any conclusion on this point necessarily applies to the whole of copyright or only to certain aspects of copyright and whether it applies to all aspects in the same way.

Whatever the outcome of such an analysis may be and wherever it may lead, inevitably the issue of the interaction between copyright and human rights remains. The question to be answered then is whether the findings can be reconciled with the idea of interaction as defined above. In addition, if the interaction idea involves a balancing of interests then where and how balancing is to take place must be determined. The question whether the balancing of interests can also take place inside a broadly conceived human rights portfolio will arise unavoidably. But now this Article turns to the question whether there are indications in international legal instruments that allow us to define copyright as a human right.

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9. U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner*, 5, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter ECOSOC Report].

I. THE HUMAN RIGHTS APPROACH TO COPYRIGHT IN INTERNATIONAL INSTRUMENTS

For the moment, leave behind legal concepts and consider the factual starting point. Broadly speaking the Article is essentially concerned with creative works, creations of the mind, and elements of cultural heritage that are of particular value to society.[10] Therefore, society finds it is in its best interest to offer some form of protection to the creators of these works.[11] Physical possession of material goods protects one's interest in the good, which then gains legal recognition in the form of a property right.[12] Whoever produces the goods and has them in his or her possession will be given property rights in the goods.[13] Similarly, protection for creative works is offered along the property route. As these works are immaterial,[14] the factual element of physical possession is unavailable and cannot form the basis of the property right. An intellectual property right is therefore created as a legal fiction, but it serves the same purpose as a material property right. Behind any property stands an owner and that copyright as a property right refers to the creator or author behind the work in this respect. This is important to keep in mind in a human rights context. Apart from the obvious references to copyright as such, the debate will also need to deal with the human rights aspects of property rights and personality rights.[15]

René Cassin, one of the architects of the current human rights framework, has emphasized the importance of the link between the act of creation and the creator and its relationship to the rights that may flow from it. In his view, potentially all human beings have the ability and the desire to develop intellectual and creative activities from which copyright works may result.[16] As such, creative activity deserves respect and protection in the same way as all other basic faculties that are common to all men.[17] This would mean that creators can claim rights by the very fact of their creation. This is a broad statement and it is by no means clear that such rights are by definition human rights and that they must cover all creations and necessarily take the

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10. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 399-408 (2d ed. 2006).

11. PAUL TORREMANS, HOLYOAK & TORREMANS INTELLECTUAL PROPERTY LAW 171-72 (4th ed. 2005).

12. *Id.* at 20.

13. *Id.*

14. They are indeed to be distinguished from their material support of carrier.

15. *See* Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, COPYRIGHT BULL., July–Sept. 2001, at 4, 5.

16. René Cassin, *L'intégration, parmi les droits fondamentaux de l'homme, des droits des créateurs des oeuvres de l'esprit, in* MELANGES MARCEL PLAISANT 225, 229 (1960).

17. *Id.*

format of an exclusive right in such creations.[18] Further analysis is therefore warranted.

A. The Universal Declaration of Human Rights

The first key provision in an international instrument that identifies copyright as a human right is found in article 27 of the Universal Declaration of human rights.[19] According to article 27 everyone has "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[20] An equally important—and perhaps countervailing principle is in the same article: "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[21]

This first paragraph of article 27 clearly has historical roots.[22] The Universal Declaration of Human Rights was drafted less than three years after the end of World War II, and those who lost the war had abused science and technology as well as copyright-based propaganda for atrocious purposes.[23] Such an abuse had to be prevented in the future, and it was felt that the best way forward was to recognize that everyone had a share in the benefits and that at the same time those who made valuable contributions were entitled to protection.[24] That process was of a human rights nature, as the series of rights and claims made in article 27 are considered universal and vested in each person by virtue of their common humanity.[25]

Although these rights were recognized in a post-war consensus, the framers viewed them as more than the product of a mere political agreement. Rather, the Universal Declaration Human Rights said that human rights exist independently of implementation or even recognition in the customs or legal systems of individual countries.[26] They are, after all, such important norms that they create prima facie obligations to take measures to protect and uphold these rights.[27] This obligation particularly applies to governments, as they are supposed to act in the common interest of human-

18. *Id.*; Vivant, *supra* note 4, at 87.

19. *See* J.A.L. STERLING, WORLD COPYRIGHT LAW 43 (2d ed. 2003).

20. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 27, U.N. Doc. A/810 (Dec. 10, 1948).

21. *Id.*

22. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2002).

23. *See id.*

24. *See id.*

25. Universal Declaration of Human Rights, *supra* note 20, art. 27.

26. *Id.* pmbl., art. 27.

27. *See id.*

ity.[28] And "[b]ecause a human right is a universal entitlement, its implementation should be measured particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and vulnerable."[29] It should not simply serve one group in society that already occupies a privileged position.[30] The benefits that are produced for "everyone" should go beyond applications of intellectual property, that is, the better goods and services that are made available as a result, and should encompass the enjoyment of the arts and especially participation in the cultural life of society.

That brings the discussion back to paragraph two of article 27.[31] This is not inasmuch a tool to implement paragraph one as it is a complimentary provision that sets up a right to the protection of moral as well as material interests. The protection of moral and material rights of authors and creators is exactly what is covered by the area of law known as copyright. And this second paragraph of article 27 of the Universal Declaration of Human Rights must therefore be seen as elevating copyright to the status of a human right, or maybe it is more appropriate to say that the article recognizes the human rights status of copyright. The roots of this second paragraph of article 27 go back to two influential elements. First, there is the French delegation's original suggestion that had a double focus. On one hand, it emphasized the moral rights of the author, which centered on his or her ability to control alterations made to the work and to be able to stop misuses of the work.[32] On the other, it recognized the right of the author or creator to receive a form of remuneration for his or her creative activity and contribution.[33] The second influence on article 27 were the Mexican and Cuban members of the drafting committee who argued that it made sense to establish a parallelism between the provisions of the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man that had at that stage been adopted very recently.[34] Article 13 of the latter dealt with intellectual property rights by stating that:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

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28. *See* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 3 (1987).

29. AUDREY R. CHAPMAN, A HUMAN RIGHTS PERSPECTIVE ON INTELLECTUAL PROPERTY, SCIENTIFIC PROGRESS, AND ACCESS TO THE BENEFITS OF SCIENCE 2 (1998), http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/chapman.pdf.

30. *See id.*

31. *See* GLENDON, *supra* note 22.

32. *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 220 (1999).

33. *See id.*

34. *See* Chapman, *supra* note 15, at 11.

> He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.[35]

Despite these rather explicit roots, it is not necessarily clear what motivated those who voted in favor of the adoption of the second paragraph of article 27 of the Universal Declaration of Human Rights. What is known is that the initial strong criticism that intellectual property was not, properly speaking, a human right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in its favor.[36]

This is of course not the strongest basis for an argument that copyright is beyond doubt a human right. In theory, the argument is not helped by the fact that, as a United Nations General Assembly action, the Universal Declaration of Human Rights is merely aspirational or advisory. While Member States were not initially obliged to implement it, the Universal Declaration of Human Rights has now gradually acquired the status of customary international law and as the single most authoritative source of human rights norms.[37] This has in turn greatly enhanced the standing of copyright as a human right, even if the economic, social, and cultural rights, of which copyright is one, are still seen as weaker provisions than those dealing with basic civil and political rights.[38]

The exact ramifications of article 27 of the Universal Declaration of Human Rights are not always clear,[39] but what is clear is that copyright as a human right requires a balance between the concepts expressed in article 27(1) and those expressed in article 27(2). Despite the uncertainty surrounding article 27, national courts have used it to protect the interests of authors on a couple of occasions.[40] For example, on April 29, 1959, the Court of Appeal in Paris granted Charlie Chaplin, a British national, French rights regarding his moral rights based on an assimilation of article 27(2) when he wished to object to the unauthorized addition of a sound track to one of his movies.[41] Similarly, article 27(2) played a prominent role in granting author status and with it moral rights in the first judgment in the

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35. American Declaration of the Rights and Duties of Man, art. XIII, May 2, 1948, O.A.S. Official Rec., OAS/Ser.L./V/I.IV, rev. 9, *available at* http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm (last visited Sept. 27, 2007).

36. *See* MORSINK, *supra* note 32, at 221.

37. *See* CHAPMAN, *supra* note 29, at 7.

38. *Id.*

39. Cassin, *supra* note 16, at 225.

40. *See* François Dessemontet, *Copyright and Human Rights*, *in* INTELLECTUAL PROPERTY AND INFORMATION LAW: ESSAYS IN HONOUR OF HERMAN COHEN JEHORAM 113, 113-20 (Jan J.C. Kabel & Gerard J.H.M. Mom eds., 1998).

41. *Id.* (citing Société Roy Export Company Establishment et Charlie Chaplin v. Société Les Films Roger Richebé, 28 R.I.D.A. 133 (1960)).

John Huston Asphalt Jungle saga, where color rather than sound was added to the movie.[42] While both cases dealt primarily with moral rights, the concept of authorship also has economic rights aspects and it is clear that article 27 covers both economic and moral rights and therefore the whole of copyright.

B. The International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights can be seen as a follow up action on the Universal Declaration of Human Rights. It took the form of a treaty and as such, it can impose legally binding obligations to implement its provisions on States that became contracting parties to it. Article 15 of the Covenant is very clear in this respect and imposes a number of responsibilities on, and steps to be taken by, contracting states in the following way:

> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the Present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.[43]

These obligations apply to the substantive rights granted in paragraph one of article 15, which are based on article 27 of the Universal Declaration of Human Rights.[44] These substantive rights comprise the rights of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and—most importantly for current purposes—to benefit from the protection of the moral and the material interests resulting from any scientific, literary, or artistic production of which he is the author.[45] Protecting the creator's rights carries additional importance because the Covenant lacks a provision dealing with property rights, which at the time of the Universal Declaration were viewed as stronger and more obvious human rights, which could also cover most of the intellectual property issues.[46]

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42. *See* Mike Holderness, *Moral Rights and Author's Rights: The Keys to the Information Age*, 1998(1) J. INFO. L. & TECH., http://www2.warwick.ac.uk/fac/soc/law-/elj/jilt/1998_1/holderness/ (last visited Sept. 27, 2007).

43. International Covenant on Economic, Social and Cultural Rights, art. 15(2)-(4), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force Jan. 3, 1976).

44. *See* CHAPMAN, *supra* note 29, at 3.

45. *See* ICESCR, *supra* note 43, at art. 15.

46. *See* CHAPMAN, *supra* note 29, at 3.

Article 15.1(c) of the Covenant clearly imposes an obligation on the contracting parties to protect the moral and material interests of authors and creators.[47] In essence, there is an obligation to implement copyright as a human right and to put in place an appropriate regime of protection for the interests of authors and creators.[48] But a lot of freedom is left to contracting states in relation to the exact legal format of that protection. The human rights framework in which copyright is placed does however put in place a number of imperative guidelines:

> (1) Copyright must be consistent with the understanding of human dignity in the various human rights instruments and the norms defined therein.
>
> (2) Copyrights related to science must promote scientific progress and access to its benefits.
>
> (3) Copyright regimes must respect the freedom indispensable for scientific research and creative activity.
>
> (4) Copyright regimes must encourage the development of international contacts and cooperation in the scientific and cultural fields.[49]

The genesis of this right was troubled and cumbersome. Many people suggested various proposals to include intellectual property rights in the Covenant; all of them attracted severe criticism and some were rejected. However, whenever a Covenant draft lacked an intellectual property rights clause further discussion was tabled until the proposal contained those rights. In the end, the incorporation of an intellectual property rights clause into the Covenant was approved by a vote of 39 to 9, with 24 Member States abstaining.[50] The Covenant then came into force several years later on January 3, 1976.[51]

Even though human rights and copyright were inextricably entwined, the copyright community all too often simply ignores this aspect of copyright. Copyright's inclusion in these instruments should not be viewed as a historical accident, and scholars should try to identify the implications and conclusions that should be drawn from it.

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47. *Id.* at 1.

48. *See* ANDRÉ BERTRAND, LE DROIT D'AUTEUR ET LES DROITS VOISINS 81 (2d ed. 1999).

49. *See* CHAPMAN, *supra* note 29, at 13.

50. Comm. on Econ., Soc., & Cultural Rights, *Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights*, ¶ 41, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000) [hereinafter *Drafting History of Article 15(1)(c)*] (prepared by Maria Green).

51. The ICESCR was adopted on December 16, 1966.

The first thing to note is that copyright has a relatively weak claim to human rights status, as its inclusion in the international human rights instruments proved to be highly controversial.[52] The copyright and intellectual property components of the various articles were only included because they were seen as tools to give effect to and to protect other more important human rights.[53]

The second conclusion flows from the first. The various elements in the articles dealing with copyright and intellectual property are interrelated, which means, for example, that the rights of authors and creators must be understood as essential preconditions for cultural freedom and for the participation and access to the benefits of scientific progress. The fact that the rights of authors and creators can also stand alone is an ancillary point.

The third observation takes this interaction one-step further. Copyright and intellectual property rights are not simply preconditions. Not only do they need to exist to facilitate cultural participation and access to the benefits of scientific progress, but they should also ensure that the other components of the international human rights instruments are respected and promoted. In this sense the rights of authors and creators should facilitate rather than constrain cultural participation and access to scientific progress.

A fourth implication is how the international human rights instruments deal with copyright and intellectual property rights.[54] They do not delineate the scope and the limits of copyright. Determining the substance of copyright is an issue that is left to the legislature.[55]

At this stage, it is worth mentioning that one can only talk in terms of a human right when the pre-normative state of a claim has been turned into a normative state that is recognized by the social group concerned. Additionally, the norm must fit the existing normative order in a coherent way. It must represent a basic freedom, an essential social condition for the better development of the individual, and must have universal reach.[56] Broadly speaking, copyright seems to meet these requirements, and its inclusion in the international human rights instruments seems justifiable on that basis, but it remains to be seen how all these elements really fit together in practice in relation to copyright.

The balancing of rights and interests is a common theme that seems to be essential to understanding how copyright operates as a human right. Two kinds of balancing acts appear to be necessary. First, an inherent balance to copyright itself involves both the private interests of authors and

52. *See Drafting History of Article 15(1)(c)*, *supra* note 50, ¶¶ 26-43.

53. *Id.*

54. *See* Chapman, *supra* note 15, at 13.

55. *See* HAIMO SCHACK, URHEBER- UND URHEBERVERTRAGSRECHT [AUTHOR AND AUTHOR TREATY RIGHTS] 40 (1997).

56. Vivant, *supra* note 4, at 73.

creators, and the wider public interests of society as a whole.[57] The next section considers this particular balancing act. But in addition to copyright's internal balance, one has to acknowledge that copyright, as a human right, is just one element in the international human rights instruments. Here again a balancing of rights, albeit of a different nature, will be unavoidable, and it will be discussed in Part III.

II. BALANCING PRIVATE AND PUBLIC INTERESTS

A. The Need for a Balancing Act

As Audrey R. Chapman put it:

> To be consistent with the full provisions of Article 15 [of the International Covenant on Economic, Social and Cultural Rights], the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level.[58]

The emphasis here is on the broad public interest of society, but any level of intellectual property protection will also give rights to the individual right holder. The private interest of the author, creator, and eventually of the copyright holder, is an inevitable component of the equation. Somehow a balance will need to be struck between these interests, as stronger individual rights inevitably impinge on the interests of society as a whole and vice versa.[59] This balance between public and private interests is not an external element for copyright or indeed any other intellectual property right. On the contrary, this balance has been internalized by copyright and it is part of copyright's fundamental nature.[60] Copyright is therefore familiar with this balance of interests.[61] On the one hand, copyright needs to protect the individual interest of the author in order to encourage further creation. This protection results in the author being given a certain amount of exclusivity, in relation to preventing certain exploitation and use of his or her work. On the other end of the balance, there is the public interest of society as a whole

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57. *See* J.A.L. STERLING, WORLD COPYRIGHT LAW 40 (1st ed. 1998).

58. *See* Chapman, *supra* note 15, at 14.

59. *See* SCHACK, *supra* note 55, at 41.

60. Compare in this respect the wording of Article 1, Section 8, Clause 8 of the Constitution of the United States of America in which Congress is vested with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 8.

61. U.N. Comm. on Human Rights, Sub-Comm. on Promotion & Protection of Human Rights, *Economics, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶ 10, U.N. Doc. E/Cn.4/Sub.2/2001/13 (June 27, 2001).

to have access to culture and to copyright works as a tool for progress and improvement.

The need for a balance prohibits granting a kind of unrestricted monopoly property right is also inherent in the wording of article 15 of the International Covenant on Economic, Social and Cultural Rights, where it requires states to make sure that everyone will be able "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[62] Enjoying such a benefit is clearly not the same as enjoying an unrestricted monopoly property right. In practice, copyright insures the balance in many ways, for example, by means of limitations and exceptions to copyright infringement rules.[63] Limitations and exceptions are attempts to strike the balance by drafting the rules to achieve a proper balance between the various interests in all practical cases.[64] There are also external correction mechanisms that intervene whenever the rule would not achieve the balance in a particular set of circumstances.[65] Circumstances that require intervening correction mechanisms bear close resemblance to the abuse of rights scenario. The use of competition principles in relation to copyright can serve as a good example to clarify the concept of balancing interests in copyright.

B. Competition Principles as an Example

1. *Principles and Justification*

It would indeed be a serious error to see copyright (and other intellectual property rights) as essentially a private monopoly right, and competition law, as defender of the public interest against inappropriate behavior, as irreconcilable opponents that fight for supremacy. Instead this Article considers how intellectual property rights, and in particular copyright, fit into our modern society and how their existence can be justified.[66] Why are intangible property rights such as copyright created? Economists argue that if everyone would be allowed to use the results of innovative and creative activity freely, the problem of "free riders"[67] would arise.[68] No one would

62. ICESCR, *supra* note 43, art. 15(1)(c).

63. TORREMANS, *supra* note 11, ch. 15.

64. *Id.*

65. For example, competition and anti-trust laws. *See infra* Section II.B; TORREMANS, *supra* note 11, at 291-312.

66. *See generally* TORREMANS, *supra* note 11, at 11-21.

67. *See* ROBERT P. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES 17 (1987).

68. Inappropriability, the lack of the opportunity to become the proprietor of the results of innovative and creative activity, causes an under-allocation of resources to research activity, innovation, and creation. *See* Kenneth J. Arrow, *Economic Welfare and the Alloca-*

invest in creation or innovation, except in rare cases where no other solution would be available,[69] as it would give them a competitive disadvantage.[70] All competitors would wait until someone else made the investment, as they would be able to use the results as well without investing money in creation and innovation.[71] Compared to the initial investment, the cost of the distribution of the knowledge is insignificant.[72] Some would argue that as a result the free market economy would not function adequately, lacking the essential elements of creation and innovation. In this line of argument, creation and innovation are required for economic growth and prosperity.[73] Property rights should be created if goods and services are to be produced and used as efficiently as possible in such an economy. The perspective that creators will have a property right in the results of their investment will stimulate individuals and enterprises to invest in further cultural and artistic creation as well as in research and development.[74] These property rights should be granted to someone who would economically maximize profits.[75] It is assumed that the creator or inventor will be motivated by the desire to maximize profits, either by exploiting the creation or invention himself or by having it exploited by a third party, so the rights are granted to them.[76]

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tion of Resources for Invention, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609-25 (Conference Proceedings of the National Bureau for Economic Research 1962).

69. For example, in a case where the existing technology is completely incapable of providing any form of solution to a new technical problem that has arisen. *See* Hanns Ullrich, *The Importance of Industrial Property Law and Other Legal Measures in the Promotion of Technological Innovation*, 1989 INDUS. PROP. 102, 103.

70. *Id.*

71. One could advance the counter-argument that inventions and creations will give the innovator an amount of lead time and that the fact that it will take imitators some time to catch up would allow the innovator to recuperate his investment during the interim period. *See* TORREMANS, *supra* note 11, at 13. In many cases this amount of lead time will, however, only be a short period, too short to recuperate the investment and make a profit. *See* Edwin Mansfield et al., *Imitation Costs and Patents: An Empirical Study*, 91 ECON. J. 907, 915-16 (1981).

72. *See* BENKO, *supra* note 67, at 17.

73. *See id.* ch. 4, at 15; U.S. COUNCIL FOR INT'L BUS., A NEW MTN: PRIORITIES FOR INTELLECTUAL PROPERTY 3 (1985).

74. John Lunn, *The Roles of Property Rights and Market Power in Appropriating Innovative Output*, 24 J. LEGAL STUD. 423, 425 (1985).

75. Michael Lehmann, *Property and Intellectual Property—Property Rights as Restrictions on Competition in Furtherance of Competition*, 20 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1, 11 (1989).

76. For an economic-philosophical approach, see Ejan Mackaay, *Economisch-Filosofische Aspecten van de Intellectuele Rechten [Economic and Philosophical Aspects of Intellectual Property Rights]*, *in* DE SOCIAAL ECONOMISCHE ROL VAN INTELLECTUELE RECHTEN [THE SOCIO-ECONOMIC ROLE OF INTELLECTUAL PROPERTY RIGHTS] 1-30 (Mark Van Hoecke ed., 1991).

While copyright plays an essential role in the free market, how such a legally created monopolistic exclusive property right fits in with the free market ideal of perfect competition requires further explanation. Initially, every form of a monopoly might seem incompatible with free competition, but some form of property right is required to enhance economic development as competition can only play its role as market regulator if property rights protect the products of human labor.[77] In this respect, the exclusive monopolistic character of property rights is coupled with its transferable nature.[78] These rights are marketable; for example, they can be sold as an individual item.

This does not end the marketization inquiry: economic development and competition occur on various levels of economic activity. Indeed, the market mechanism is more sophisticated than the competition-monopoly dichotomy. Competitive restrictions at one level may be necessary to promote competition at another level.[79] Three market levels can be distinguished: production, consumption, and innovation.[80] Property rights in goods enhance competition on the production level, but this form of ownership restricts competition on the consumption level. One has to acquire the ownership of the goods before one is allowed to consume them, and goods owned by other economic players are not directly available for one's own consumption. In turn, intellectual property rights impose competitive restrictions at the production level. For example, only the owner of the copyright in a literary work may produce additional copies of that work and exploit it in any other way. These restrictions benefit competition on the creation level. The availability of property rights on each level guarantees the development of competition at the next level. Property rights are a prerequisite for normally functioning market mechanisms.[81] Copyright restrictions are needed to enhance further creation of copyright work, which is clearly what is required and desirable from a public interest point of view. This is the only way in which copyright can, in the words of the American Constitution, play its public interest role "[t]o promote the Progress of Science and useful Arts . . . ."[82]

Not only does this go a long way in demonstrating that the copyright system at its inception is influenced heavily by public interest imperatives

77. Lehmann, *supra* note 75, at 12.

78. This is demonstrated by the combined effect of Sections 1 and 90(1) of the United Kingdom's Copyright, Designs and Patents Act of 1988. Copyright, Designs and Patents Act, 1988, c. 48, §§ 1, 90(1) (Eng.).

79. *See* GUSTAVO GHIDINI, INTELLECTUAL PROPERTY AND COMPETITION LAW: THE INNOVATION NEXUS (Edward Elgar ed., 2006).

80. Lehmann, *supra* note 75, at 12.

81. Michael Lehmann, *The Theory of Property Rights and the Protection of Intellectual and Industrial Property*, 16 INT'L REV. INDUS. PROP. & COPYRIGHT L. 525, 539 (1985).

82. U.S. CONST. art. I, § 8, cl. 8.

and that the balance that it tries to achieve between the interest of the rights holders and of the public users is based on public interest considerations. Yet again, the public interest is involved, this time in regulating the use of the exclusivity granted by copyright.[83] The *Magill*[84] and *IMS Health*[85] cases—both from the European Community—are good examples in this area.

2. Magill *and* IMS Health

Magill was concerned with the copyright in TV listings.[86] The broadcasters that owned the copyright refused to grant a license to Magill who needed it to be able to produce a comprehensive weekly TV listings magazine for the Irish market.[87] In this instance, nothing is wrong with the copyright. However, there is a problem clearly situated at the level of the use that is made of the copyright. At the starting point, it is up to the right holder to decide how to use the right, and as such, a refusal to license does not amount to a breach of competition law. But the Court of Justice argued that a refusal might, in exceptional circumstances, constitute an abuse,[88] and that exceptional circumstances were involved in this case.[89] The broadcasters' main activity is broadcasting; the TV guides' market is only a secondary market for them.[90] By refusing to provide the basic program listing information, of which they were the only source, the broadcasters prevented the appearance of new products which they did not offer and for which there was a consumer demand.[91] The refusal could not be justified by virtue of their normal activities. And, by denying access to the basic information which was required to make the new product, the broadcasters were effectively reserving the secondary market for weekly TV guides to themselves.

In essence, the use of copyright to block the appearance of a new product for which the copyright information is essential and to reserve a secondary market to ones self is an abuse and cannot be said to be necessary to fulfill the essential function (reward and encouragement of the author) of copyright. Here again one clearly sees the public interest input. Competition law is used to make sure that copyright is used according to its proper intention, that is, in the public interest. Any abuse of the right against the

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83. *See* TORREMANS, *supra* note 11, at 302-09.

84. Radio Telefis Eireann and Indep. Television Publ'ns Ltd. (Magill) v. Comm'n of the European Communities, 1995 E.C.R. I-743.

85. NDC Health Corp. v. IMS Health Inc., 2002 E.C.R. I-3401.

86. *Magill*, 1995 E.C. R. I-743, ¶¶ 10-11.

87. *Id.*

88. *Id.* ¶¶ 54, 57.

89. *Id.* ¶¶ 50-57.

90. *Id.* ¶¶ 54, 57.

91. *Id.*

public interest, even if it would further enhance the exclusive monopolistic-style property right of the copyright owner by giving it full and unfettered control over the work and its use, will constitute a breach of competition law.[92]

IMS Health[93] is the complex follow up case. IMS Health developed a brick structure to facilitate the collection of marketing data on the German pharmaceutical market.[94] It owned the copyright of the brick structure and refused to grant a license to its potential competitors.[95] In comparison with *Magill* a number of complicating factors arise. First, it is not entirely clear whether there is a secondary market involved, as IMS Health and its competitors both wished to operate on the primary market for the collection of pharmaceutical data in Germany. Second, it is uncertain whether under the circumstances the emergence of a new product would be blocked, as the competitors were only interested in copying IMS's block structure without necessarily providing the user with a different product. The main point in *IMS Health* is not the question whether the requirements of reserving a secondary market to oneself and blocking the emergence of a new product can be defined in a more flexible way, but rather the question whether these two requirements need to be met cumulatively or whether meeting one of them is sufficient to trigger the operation of competition law. The definitional problems really come down to defining the boundaries of the public interest on this point, and the question whether the requirements apply in a cumulative manner defines when the threshold for an intervention by competition law in defense of public interest concerns is met. The *IMS Health* case illustrates that striking the balance is not a straightforward or easy task and that the facts of any new situation may require further fine-tuning of the balance.

As *Magill* and *IMS Health* show, society has a strong interest in access to information, and this interest can be impeded by the private interest of the right holder to enhance his exclusive property right. But it is not just passive access for society as a whole that is required. Each member of society must have a right to access and to borrow ideas and expressions in order to exercise his or her fundamental freedoms to create and to exercise his or her human right to benefit from copyright in his or her creative effort. Copyright therefore simply cannot prohibit any and all borrowings.[96] This is another element that is to be taken into account in the fine-tuning of the balance.

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92. TORREMANS, *supra* note 11, at 302-09.
93. *IMS Health*, 2002 E.C.R. I-3401.
94. *Id.* ¶ 3.
95. *See id.*
96. Dessemontet, *supra* note 40, at 113-20.

3. *Not Only Economic Considerations Count*

Copyright's built-in mechanisms to balance the private and public interests[97] are further complicated when non-economic interests are considered.[98] A human rights perspective assumes the author or creator is important. This manifests itself in the work produced by these authors or creators, by being acknowledged as having "an intrinsic value as an expression of human dignity and creativity."[99] In terms of copyright law, this is reflected by the balance between economic and moral rights, with the latter recognizing the fundamental link between the work and the author or creator. Moral rights survive as rights of the author or creator even when the latter transfers the economic rights in the work, thereby preserving the fundamental link.[100] The moral rights of paternity[101] and integrity[102] operate as fundamental minimal rights: they do not usually stand in the way of the normal exploitation of the work and the economic rights in it, but rather allow the author to object to clearly abusive use of the work that would deny or distort his or her contribution as an expression of his or her human dignity and creativity.[103] This fairly balances economic rights, but another important aspect of the overall balancing act is required if copyright is to operate properly as a human right: its relationship to other human rights. "[T]he question essentially is [and remains] where to strike the right balance."[104]

III. COPYRIGHT'S RELATIONSHIP WITH OTHER HUMAN RIGHTS

Part II suggested that a second part of the balancing act relates to the relationship between copyright and other human rights. The statement that human rights must have equal value when compared to one another and that one cannot simply overrule the other is an intuitive assumption. It adds yet another factor to consider when balancing public and private interests. The way in which this Article considered the balance up to now reflects on the content of article 27 of the Universal Declaration of Human Rights and article 15 of the International Covenant on Economic, Social and Cultural Rights which both contain elements that refer to the public as well as the

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97. ECOSOC Report, *supra* note 9.

98. *See* CHAPMAN, *supra* note 29, at 2.

99. *See* Chapman, *supra* note 15, at 14.

100. *See* TORREMANS, *supra* note 11, at ch. 13.

101. That is, the right to be identified as author of the work.

102. That is, the right to object to the distortion or mutilation of the work that could affect the author's reputation, as enshrined in article 6bis of the Berne Convention.

103. *See* TORREMANS, *supra* note 11, at 220-28; Paul Torremans, *Moral Rights in the Digital Age*, *in* THE NEW DIGITAL ENVIRONMENT: THE NEED TO REDESIGN COPYRIGHT 97-114 (Paul Torremans & Irina A. Stamatoudi eds., 2000).

104. ECOSOC Report, *supra* note 9, ¶ 12.

private interest, and bring them together. However, the primary objective of promoting and protecting human rights needs to be added to that balance.[105]

Article 5(1) of the International Covenant on Economic, Social, and Cultural Rights backs this up from a legal point of view by stating that:

> [n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.[106]

Copyright and its balance between public and private interests must therefore put in place a regime that is consistent with the realization of all other human rights.[107]

The right of freedom of information and access to information[108] provides a good example of another fundamental human right that needs to be respected, but the implementation of which, alongside the implementation of copyright as an exclusive right, might create problems in a number of circumstances and will therefore call for a careful balancing of all the rights and interest.[109] The aim must be to respect both rights to the optimal extent possible. Maybe the suggestion of the German Constitutional Court that the freedom of access to information can still be guaranteed in those cases where whoever seeks access does not get that access free but for the payment of a fee could be a way forward. Access is guaranteed, but it is not entirely free access, and copyright is respected by means of the remuneration whilst giving up the right to refuse to grant a license as a part of the exclusive right in the work.[110]

The same kind of balance between various human rights is also found in a slightly different context in national constitutions and in the way in which they protect copyright as a human right. Some constitutions, such as the Swedish[111] and the Portuguese[112] constitutions have a direct copyright

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105. *See id.* ¶ 13.

106. ICESCR, *supra* note 43, art. 5(1).

107. Chapman, *supra* note 15, at 14.

108. As found, for example, in article 19 of the Universal Declaration of Human Rights. *See supra* note 20, art. 19.

109. BERTRAND, *supra* note 48, at 81.

110. SCHACK, *supra* note 55, at 42.

111. Chapter 2, article 19 of the Swedish Constitution of January 1, 1975 provides: "[a]uthors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law." Regeringsformen [RF] [Constitution] 2:19 (Swed.), *available at* www.riksdagen.se/templates/R_PageExtended____6319.aspx.

112. Article 42 of the Portuguese Constitution of April 2, 1976 (last revised in 2004), reads:

> (Freedom of cultural creation)[:]
>
> 1. Intellectual, artistic, and scientific creation are unrestricted.
>
> 2. This freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic works and shall include the protection of copyright by law.

clause, but most of them protect copyright as a human right by bringing aspects of it under other constitutional provisions covering other fundamental rights. The German constitution is an example on point.[113] The German Constitutional Court has intervened in copyright cases on many occasions despite the fact that the German constitution does not have a copyright clause.[114] Instead, there is a consensus in Germany that parts of copyright are covered by the property clause in the constitution.[115] Especially the economic rights part of copyright can be considered as immaterial property, and is hence entitled to protection under the right of fundamental respect for property.[116] Moral rights, on the other hand, refer to the author and show a strong overlap with personal rights.[117] Personal rights are also specifically protected by the German constitution.[118] These separate aspects of fundamental rights protection then have to be put together to come to an overall protection of copyright as a fundamental human right. This clearly does not simply amount to an adding up exercise.[119] The individual components may overlap and they protect different interests, which may enter into conflict with one another when pushed to extreme heights of protection. Here too a balancing of these different fundamental rights will be required.

Exactly how this balancing works depends on the specific facts of the case. The higher the level of creativity and the more important the input of the creator is, the stronger the human rights claim of copyright will be. Not all works and not all situations will give copyright the same strength in its claim to human rights status and in its balancing exercise with other human rights.[120]

CONST. OF PORTUGUESE REP. art. 42, *available at* www.parlamento.pt/ingles/cons_leg/Constitution_definitive.pdf.

113. Article 14 of the German Constitution deals with property and, indirectly, with copyright. Grundgesetz für die Bundesrepublik Deutschland (federal constitution) GG, art. 14, *available at* www.oefre.unibe.ch/law/lit/the_basic_law.pdf.

114. Its decision of July 7, 1971 dealt with the use of copyrighted works in churches and schools. *See* Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 7, 1971, 31 BVerfGE 229 (F.R.G.). More recently, there was the Bob Dylan decision of January 23, 1990. (E 81,208) [1990] GRUR 438.

115. SCHACK, *supra* note 55, at 38.

116. *Id.* at 40-43.

117. *See* URHEBERRECHT: KOMMENTAR § 12ff, Nos. 1-13, at 243-47 (Gerhard Schricker ed., 2d ed. 1999); ANDRÉ LUCAS & HENRI-JACQUES LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 303 (2d ed. 2001); Frédérique Poullaud-Dulian, *Droit moral et droits de la personnalité*, 1994 LA SEMAINE JURIDIQUE 3780; Anne Bragance v. Michel de Grèce, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 1, 1989, 139 R.I.D.A. 301 (Fr.).

118. SCHACK, *supra* note 55, at 39-40.

119. *See* URHEBERRECHT: KOMMENTAR, *supra* note 117, at 247-49.

120. *See* Vivant, *supra* note 4, at 103, 105.

CONCLUSION

This Article set out to demonstrate that copyright has a claim to human rights status. It has shown that there is a basis for such a claim in the international human rights instruments, but it has also become clear that the provisions in these instruments that could be said to be the copyright clauses do not define the substance of copyright in any detail. Instead, one is left with a series of conclusions and implications for copyright and its substance as a result of its human rights status. The most important points are the balance that needs to be achieved between private and public interests and the equilibrium that needs to be achieved with other human rights.[121]

This balancing of rights can be seen as inherently internal to copyright as a human right. The analogy of competition principles in relation to copyright demonstrates this clearly.[122] Interaction and balancing of rights are present indeed in the very roots of copyright and in all its principles. One could see copyright as based on the principle of access. Our society sees change and evolution as a good thing that will eventually result in progress. In that line of thinking, it is vital that society and its members gain access not only to new products, but also to new copyright works. Thus new and existing elements of knowledge and culture can be spread for the benefit of society. Public access needs to be balanced with the need for some incentive for the creator and author. They need to create the works in the first place, before the public can be given access to them. The result is a right of reproduction and one of communication to the public for the creator and the user is free to read and to browse the work.

That internal balance in copyright also touches upon other human rights.[123] Freedom of expression from the side of the author is only a reality because the exclusive right allows the author to seek the economic and financial support from a publisher, which is necessary to be able to express his or her views effectively and to the public at large. At the same time the exclusive right is not absolute, which means that the user can in turn use the work as a basis for the creation of his or her own work in which he or she expresses his or her own ideas. Freedom of expression is therefore also engaged on the other side of the divide, with copyright providing the balance between the various interests. A similar balancing act restricts the exclusive rights in information in order to secure access to information for the public, while providing the tools to collect and structure the information on an economically viable basis. Copyright theory can demonstrate suc-

121. *See supra* Part I.
122. *See supra* Part II.
123. *See supra* Part III.

cessfully that concepts such as 'a copyright work'[124] and 'originality'[125] can be used in copyright as filters that allow copyright to get the balance right and to successfully deal with the interaction of rights.

This Article began with a question that was not obvious and provided evidence that demonstrated that copyright has a claim to human rights status. Although its relationship to human rights is not straightforward, perhaps the presence in every fiber of copyright of these principles of interaction and balancing of rights reinforces the conclusion that copyright has a claim to human rights status after all.

124. Thomas Dreier, *The Influence of Economical, Moral and Informational Considerations upon the Notion of the Protected Work*, *in* JAN ROSÉN AND PER JONAS NORDELL, COPYRIGHT, RELATED RIGHTS AND MEDIA CONVERGENCE IN THE DIGITAL CONTEXT 60-72 (2001).

125. Per Jonas Nordell, *The Notion of Originality—Redundant or Not?*, *in* ROSÉN & NORDELL, *supra* note 124, at 73-86.